

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

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**FILE:** B-212923

**DATE:** January 27, 1984

**MATTER OF:** National Heat and Power Corporation

**DIGEST:**

1. In order to have an error in bid corrected after bid opening, a bidder must submit clear and convincing evidence of the error and the intended bid price. Moreover, the weight given to such evidence is a question of fact to be considered administratively by the procuring agency, whose decision will not be disturbed by our Office unless it is without a reasonable basis.
2. GAO cannot question procuring agency's refusal to permit correction of a bid mistake alleged after bid opening where documentation submitted in support of claim is not sufficient to clearly and convincingly establish bid price.
3. Where a bidder alleges a mistake after bid opening, it is not then generally free to decide to waive its claim. Nevertheless, waiver will be permitted if it is clear that the intended bid would have been the lowest even though the intended bid could not be clearly proven for the purpose of bid correction.

National Heat and Power Corporation (National) protests the rejection of its bid under invitation for bids (IFB) No. N62472-82-B-0128 issued by the Naval Facilities Engineering Command, Department of the Navy. The IFB was issued for the replacement of critical air handlers at the Naval Regional Medical Center, Great Lakes, Illinois. The protest is sustained.

**BACKGROUND**

The original bid submitted by National was for \$223,945. The next low bid was submitted by Independent

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Mechanical Industries, Inc., for \$243,900. After bids were opened on June 14, 1983, the agency asked National to verify its bid and determine if any error had been made since National's bid was lower than the government estimate. In response, National alleged that an error was made in the calculation of labor costs in its bid. According to National, the labor breakdown was tabulated on two recapitulation sheets and totaled 1,984 hours. When the final bid was prepared, only the subtotal from the first recapitulation sheet, 1,760 hours, was carried over to the summary sheet. National submitted copies of the recapitulation sheets and the summary sheet to support its contention.

Although National affirmed its original bid and offered to complete the contract at the original price, the agency refused to accept the bid and awarded the contract to the next lowest bidder. National asserts that, because it had agreed to waive its error claim and accept the contract at its original bid price, it should have been awarded the contract since it would have been the lowest bidder even at its "intended" bid price.

#### Correction of Mistake

Although our Office has retained the right to review agency decisions regarding bid correction, the authority to correct mistakes alleged after bid opening, but prior to award, is vested in the procuring agency. The weight to be given such evidence is a question of fact to be considered administratively by the designated evaluator of evidence whose decision will not be disturbed by our Office unless it is without a reasonable basis. Advanced Images, Inc., B-209438.2, May 10, 1983, 83-1 CPD 495.

The materials supplied by National in support of its claim of bid error do not establish the rate at which the additional 224 hours would have been costed in National's intended bid. Therefore, we believe that the Navy had a reasonable basis to conclude that the evidence presented by National was not sufficient to clearly and convincingly prove its intended bid price, a requirement necessary to allow bid correction. Defense Acquisition Regulation (DAR) § 2-406.3 (a)(2) (1976 ed.).

### Waiver of Error

We believe the agency made a reasonable determination in not allowing bid correction. However, we disagree with its decision to not allow National to waive its error and perform the contract at the original bid price.

Where a bidder alleges a mistake after bid opening, the bidder is not then free to decide to waive its mistake claim; to permit the bidder to do so would be to allow the bidder the impermissible option of either affirming its low bid or withdrawing it, depending on which appeared to be in its best interest. 52 Comp. Gen. 706 (1973). However, we have permitted an exception to the rule against waiver if it is clear that the "intended" bid would have been the lowest even though the amount of the intended bid could not be clearly proven for the purpose of bid correction. Bruce-Anderson Co., Inc., B-203777, October 14, 1981, 81-2 CPD 310. Whether the "intended" bid would have been the lowest may be ascertained by reference to reasonable estimations of omitted costs. Bruce-Anderson Co., Inc., supra.

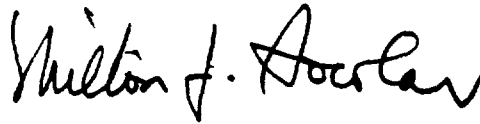
The agency concedes that National's workpapers provide sufficient evidence to support a claim of bid error, but contends that they provide nothing to support a reasonable determination of the intended bid. We disagree.

Considering the difference of \$19,555 between National's bid and the next lowest bid, we believe it is reasonable to assume that National would have been the lowest bidder if its "intended" bid were allowed. Although there is nothing in the workpapers to support the \$25 per hour labor rate that National asserts would have been applicable to the additional 224 hours, that rate would have had to be more than tripled for National not to remain the lowest bidder. More precisely, National would have had to cost the 224 hours at more than \$87.30 per hour to be upset as the lowest bidder. We believe it is unreasonable for the agency to conclude that National would have costed the additional 224 hours at a rate that much higher than the rate applied to the 1,760 hours included in the bid. Therefore, the protest is sustained.

In determining whether it is in the government's best interest to recommend action which may result in the

termination of an improper award, we consider such factors as the seriousness of the procurement deficiency, the degree of prejudice to other offerors or to the competitive procurement system, the extent of performance, and the cost to the government. Power Systems, B-210032, August 23, 1983, 83-2 CPD 232.

We have been advised by the agency that the contract was awarded to the second low bidder who has ordered all the materials needed for the contract. Considering the small difference in cost between the low and second low bids and the relatively high cost of materials, we do not consider that it would be in the best interest of the government to terminate for the convenience of the government the award made and to make an award to the low bidder. Thus, no recommendation is made for corrective action. However, by separate letter of today, we are advising the Navy of the deficiency in this procurement.

*for*   
Controller General  
of the United States